No. 76-497

In the Supreme Court of the United States

OCTOBER TERM, 1976

RICHARD TAXE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 540 F. 2d 961.

JURISDICTION

The judgment of the court of appeals was entered on June 8, 1976. A petition for rehearing [redacted] with a suggestion for rehearing *en banc* was denied on August 23, 1976. The petition for a writ of certiorari was filed on October 8, 1976, and is therefore out of time under Rule 22(2) of Rules of this Court. The jurisdiction of this Court is invoked under 1254(1).

QUESTIONS PRESENTED

1. Whether the Sound Recording Amendment of 1971, 17 U.S.C. (Supp. V) 1 *et seq.*, is unconstitutionally vague on its face or as applied in this case.

2. Whether the prosecutor's closing argument denied petitioner due process.

3. Whether the district court erred in not holding a hearing on petitioner's challenge to the affidavits underlying four search warrants.

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, petitioner and three others were convicted of infringing copyrighted sound recordings, willfully and for profit, in violation of 17 U.S.C. (Supp. V) 1(f), 101(e) and 104, and of conspiring to do so, in violation of 18 U.S.C. 371. In addition, petitioner was convicted of mail fraud, in violation of 18 U.S.C. 1341. He was sentenced to four years' imprisonment and fines totalling $26,000, and ordered to pay the costs of his prosecution. The court of appeals affirmed the convictions but vacated and remanded that portion of the judgment imposing costs on petitioner (Pet. App. A).

Petitioner stipulated at trial that, at his direction, record albums and tapes manufactured by major record companies were purchased on the open market and copied onto tapes that were then sold to the general public (Pet. 6). In the copying process slight changes were made in each recording: the speed was increased or decreased, echo effects were produced, and some sounds were eliminated or others were added by use of sophisticated electronic equipment. Petitioner and his co-defendants then promoted the sale of these altered tapes as authentic works, describing them as "Today's hits as done by your favorite artists. Custom simulated by Sound 8 singers and musicians" (*ibid.*; Pet. App. A2).

ARGUMENT

The Sound Recording Amendment to the Copyright Act, 17 U.S.C. (Supp. V) 1 *et seq.*, provides copy-

right protection for sound recordings that are "fixed" after February 15, 1972. The owner of a copyright in a sound recording is granted the exclusive right to "duplicate" the recording, as by records or tapes that "recapture[ ] the actual sounds fixed in the recording" (17 U.S.C. (Supp. V) 1(f)). That right, however, does not extend "to the making or duplication of *another* sound recording that is an *independent* fixation of *other* sounds, even though such sounds imitate or simulate those in the copyrighted sound recording" (*ibid.*; emphasis added).

The Amendment further provides that the "unauthorized manufacture, use, or sale" of records and tapes that are "copies" of copyrighted musical works "shall constitute an infringement of the copyrighted work" subjecting the infringer to civil liability and, "in a case of willful infringement for profit," to criminal prosecution (17 U.S.C. (Supp. V) 101(e)). Willful infringement for profit carries with it a penalty (in the case of a first offender) of up to one year's imprisonment and a fine of not more than $25,000 (17 U.S.C. (Supp. V) 104(b)).

1. Petitioner contends (Pet. 9-40) that the law is unconstitutionally vague on its face.

Since First Amendment freedoms are not involved in this case, petitioner's challenge " 'must be examined in the light of the facts of the case at hand' "—that is, as the statute has been applied to his conduct—unless the statute can be said to have "proscribed no comprehensible course of conduct at all." *United States* v. *Powell*, 423 U.S. 87, 92 (quoting *United States* v. *Mazurie*, 419 U.S. 544, 550). Both courts below correctly determined that the statute forbids a reasonably ascertainable course of conduct.

First, a "sound recording"—the work subject to copyright protection—is defined as a work "that result[s] from

the fixation of a series of musical, spoken, or other sounds" (17 U.S.C. (Supp. V) 26). The meaning of "fixation" in the context of the statute imports the capture and preservation (on a device such as a record or a tape) of sounds for further perception or communication (see *ibid.*). The copyright owner's exclusive right to "duplicate" (17 U.S.C. (Supp. V) 1(f)) such sound recordings is not (contrary to petitioner's assertion (Pet. 19-20)) unconstitutionally vague simply because the term "duplicate" is not further defined in the statute. Read in context and given its commonsense meaning, the copyright owner's exclusive right to "duplicate" his sound recording conveys upon him the sole power lawfully to reproduce his work, much as the copyright owner of a literary work has the exclusive right to duplicate the subject of his copyright.

Furthermore, the exclusive right of duplication conferred upon the copyright owner—and therefore forbidden to all others during the period of the copyright—derives additional meaning from the limits the statute sets on that right. Thus, individuals other than the copyright owner may with impugnity "mak[e] or duplicat[e]* * * another sound recording that is an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording" (17 U.S.C. (Supp. V) 1(f)). In simple terms, the statute permits anyone, by efforts that are independent of the copyright owner's, to produce and reproduce "other sounds" than those that appear in the copyrighted work—even if those "other sounds" are intended to be and indeed are quite similar to the ones subject to the statute's protection.

A record or a tape that is not an "independent fixation of other sounds," however, is a "cop[y] of the copyrighted musical work." Whether the sounds on a particular record or tape constitute a copy of a copyrighted work, or an

independent fixation of other sounds, typically poses issues of similarity for the trier of fact to resolve. See *Ideal Toy Corp.* v. *Fab-Lu Ltd. (Inc.)*, 360 F.2d 1021 (C.A. 2); *First American Artificial Flowers, Inc.* v. *Joseph Markovits, Inc.*, 342 F. Supp. 178 (S.D.N.Y.). If the record or tape is found to be a copy, its unauthorized manufacture, use, or sale will constitute infringement (17 U.S.C. (Supp. V) 101(e)).

In short, the statute meaningfully proscribes ascertainable conduct. It cannot be said to " 'leave[] open * * * the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against' " (*United States* v. *Powell, supra*, 423 U.S. at 92, quoting from *United States* v. *L. Cohen Grocery Co.*, 255 U.S. 81, 89). Those who sincerely desire to do so may without undue difficulty conform their conduct to the statute's demands. While there may be cases at the margin where the reach of the statute's prohibition against infringement may cause doubt, that is not reason enough to overcome the presumption of validity that attaches to Acts of Congress (*United States* v. *National Dairy Products Corp.*, 372 U.S. 29, 32), for "the law is full of instances were a man's fate depends on his estimating rightly" (*Nash* v. *United States*, 229 U.S. 373, 377).

2. Since the Sound Recording Amendment is not unconstitutionally vague on its face, the question becomes whether, as petitioner also contends (Pet. 40-54), that statute is unconstitutionally vague as applied to this case. We submit that it is not. Petitioner was on notice that the copying and unauthorized use of another's copyrighted work is prohibited. He took the risk, when he rerecorded copyrighted works in their entirety while making only insignificant changes in them, that a jury might find that he had copied the originals within the

meaning of the statute. That the jury so found is hardly surprising, given that the success of petitioner's marketing of the "pirated" recordings was directly dependent on the public's acceptance of his advertisement of "[t]oday's hits as done by your favorite artists."

Petitioner argues (Pet. 44-45) that the statute is unconstitutionally vague as applied to him for an additional reason. He contends that, since the Registrar of Copyrights permits an entire record album to carry a single copyright notice, notwithstanding that some of the bands on that record may contain sound recordings that were fixed prior to the statute's effective date and thus not copyrighted, an individual in petitioner's position is unable to tell from the album alone which sound recordings on an album are protected and which are not.

Conspicuously absent from petitioner's argument is any claim that he has been convicted of infringing any noncopyrighted sound recordings.[1] Indeed, petitioner's argument amounts to the unpersuasive assertion that, since the Registrar of Copyrights has erroneously afforded copyright protection to some sound recordings not entitled to that protection under the statute, it violates due process to convict petitioner of infringing sound recordings that are entitled to and have that protection.

In sum, even assuming that the practice allowed by the Registrar has the effect in some cases of seeming to

[1]The government initially charged petitioner with infringing a number of entire albums. When the district court ruled that there could be no infringement of particular "bands" containing sound recordings "fixed" prior to the effective date of the statute, the government limited the infringement charges to individual "bands" that were the subject of valid copyrights (Pet. App. 5). Thus petitioner could not have been found guilty of infringing noncopyrighted works.

grant protection to works not copyrightable,[2] that cannot make the application of the statute's prohibition in cases where the infringed works are lawfully copyrighted unconstitutional on vagueness grounds.

3. Petitioner next contends (Pet. 55-93) that improper remarks by the prosecutor during closing argument deprived him of a fair trial. The court of appeals gave careful attention to this claim (Pet. App. 7-10). Although it concluded that several of the prosecutor's remarks were "unprofessional," "troublesome," "[un]reasonable," and constituted "misconduct," it also viewed other of the challenged remarks as "permissible," "supported by evidence," and constituting "fair comment" (Pet. App. 8-10). It held that, on balance and given the district court's curative instructions, any error caused by the prosecutor's closing argument was not sufficiently prejudicial to warrant reversal.

The district court was in the best position to gauge the propriety and impact of the prosecutor's argument on the fairness of the trial. The court of appeals closely scrutinized the argument in light of "the facts as a whole" (Pet. App. 9).

[2]As the court of appeals observed (Pet. App. 4), the statute itself appears to contemplate the practice allowed by the Registrar in providing that "[t]he copyright provided by this title shall protect all the copyrightable component parts of the work copyrighted" (17 U.S.C. 3). Furthermore, as the court also noted (Pet. App. 4-5), anyone wishing to determine whether particular "bands" of a copyrighted album are in fact not subject to the statute's protection may do so by obtaining (for a fee) a copy of the copyright certificate from the Registrar (17 U.S.C. 215). Since the copyright notice on the album gives notice that some, even if not all, of the bands are protected, and since it is relatively simple to determine which bands are or are not protected, it cannot be said that the Registrar's practice makes compliance with the law unconstitutionally difficult.

Those courts were satisfied that due process was not denied, and further review by this Court is not necessary.[3]

4. Petitioner contends (Pet. 94-103) that the district court erred in refusing to hold a hearing on his challenge to the accuracy of the affidavits underlying four search warrants, pursuant to which many of petitioner's infringing tapes were seized. Petitioner argues, as he did in the district court, that the FBI agent who made the averments in the affidavits wrongfully omitted to state that he and other agents had previously been guided (by petitioner himself) about the premises described in the affidavit and had found no "pirated" tapes, thereby making the averment that such tapes would be found on those premises untruthful.

The court of appeals correctly ruled (Pet. App. 7) that these claims are insubstantial. The omission of any mention of the tour of the premises given by petitioner was immaterial to the question of probable cause. It does not follow, simply because on a tour guided by petitioner himself the agents did not see any "pirated" tapes, either that such tapes were not in fact on the premises (as indeed they turned out to be) or that the agent's statement of his belief that they were present (a belief that was amply confirmed) constituted a deliberate falsehood intending to deceive the magistrate into authorizing a search on less than probable cause. As the court of appeals ruled (Pet. App. 7) "[t]he recording contains no

[3]There is no need to hold this case pending the decision in *Darden* v. *Florida*, No. 76-5382, certiorari granted November 1, 1976. In that case a state prosecutor in summation characterized the defendant as an animal who should be kept on a leash (Pet. App. B, p. 750) and repeatedly expressed his wish that the defendant had been killed or mutilated by one of the victims of the crime for which the defendant was on trial. Taken even in their worst light, the comments by the federal prosecutor in the present case are benign in comparison.

substantial showing of falsity."[4] Petitioner suggests no persuasive reason for further review of this conclusion, and accordingly there is no need in this case to consider what remedy might be appropriate where the affidavit underlying a search warrant does indeed contain a misstatement or a material omission.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4]In an affidavit filed by the agent in connection with the government's opposition to petitioner's motion to suppress, the agent explained that during the tour of the premises he was not shown the offices, and that he did see large tape reels that he believed to be copies of masters used to produce the illegal tapes, and unlabeled tape cartridges that he believed to be illegal tapes. See the government's brief on appeal, pp. 81-82. Furthermore, the tour did not include a visit to a secret room on the premises, located behind a false bookshelf. See *id.* at 24, 39-40, 83.

[5]The courts of appeals have not adopted a uniform approach to the problem of misstatements in search warrant affidavits, as we discuss in our Brief in Opposition in *Lee* v. *United States*, No. 75-6969, certiorari denied October 18, 1976, a copy of which we are sending to petitioner's counsel. The different approaches of the several courts of appeals are irrelevant here, where the affidavit did not contain any material omission or any false statement.

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